FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-233

IN THE

Supreme Court of the United States

October Term 1989

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

v

ELIZABETH McCLELLAND GANT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Milton S. Seligman*
Paul A. Phillips
Attorneys for Respondent
Suite 1200-W Sandia Savings Building
400 Gold Ave., SW
Albuquerque, NM 87102
(505) 242-6784

* *Counsel of record*

QUESTIONS PRESENTED FOR REVIEW

1. In a diversity of citizenship action, was it proper for the U.S. District Court to construe a testamentary trust in a Will which has been probated 44 years ago in a state probate court which never construed the will or the testamentary trust.

2. In a diversity of citizenship action, can the U.S. District Court construe the provisions of a testamentary trust as to the meaning, in the context of the will, of the words "sufficient to insure an adequate living for my said granddaughter during her lifetime", when the assets of the trust estate, and the trustee, had for 44 years been under the passive administration and supervision of a State District Court which had never adjudicated any controversies during such time nor had construed such provisions of the Will.

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All parties are named in the caption.

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1. The case would have no general significance and would set no precedent.

2. The lower court's decision conforms with Supreme Court decisions and does not depart from Tenth Circuit precedents.

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The Respondent respectfully urges that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

OPINIONS BELOW

(Appendix References are to the Petition's Appendices)

There were no reported Opinions Below. The District Court entered Judgment (Appendix A-3) after making its Findings of Fact and Conclusions of Law (Appendix A-1) and after denying a Request by Respondent for Costs and Attorneys Fees and a Motion of Petitioner to Amend the Findings, in an unpublished Memorandum Opinion (Appendix A-2). The panel of the Court of Appeals for the Tenth Circuit unanimously affirmed the Judgment in an Order and Judgment entered for the Court by Stephanie K. Seymour, Circuit Judge, which contained the notation: "This order and judgment has no precedential value and shall not be cited or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel" (Appendix B). Rehearing was unanimously denied and suggestion for rehearing en banc was denied, having failed to obtain a single request to poll the Court (Appendix D).

STATEMENT OF CASE

Respondent supplements and contradicts the Petitioners' Statement of the case as follows:

In the second sentence of the first paragraph Petitioners, in stating "the probate court construed the trust as contained in the Will" have blatantly and deliberately misstated the action of the New Mexico Probate Court. They noticeably failed to include either the February 19, 1942 Probate Court Order, or any of the proceedings leading up to the Order, as appendicies to their Petition, and for good reason. There is not a word in the prior proceedings or in said Order indicating a request for a construction of the Will, or the making of such a construction. On the contrary, the Court, without purporting to construe anything, in addition to reciting the same dollar amount set forth in the Will, added that the only in-

terest "Gant has in said estate is that interest provided and set forth for her in the last will and testament of said decedent". The Probate Court did not attempt to deal with construction of what was set forth in the words "sufficient to insure an adequate living for my said granddaughter during her lifetime", and did not even refer to that provision or various other provisions which would necessarily be involved in a construction of the Will. (Jurisdiction of the Probate Court to construe a will is not conceded, nor is it expressed in Section 16-410 which is set forth at length by Petitioner under the heading "Statutes Involved").

The misstatement by Petitioners of the action of the Probate Court is evident from an examination of the District Court's response to such contentions, set forth in Finding of Fact No. 16 (at 4-a) and Nos. 20 and 22 (at 5-a), and in conclusion of Law Nos. 6, 7 and 8 (Page 7-a), all in Appendix A-1 to the Petition.

There was no reason for anyone to appeal from the February 19, 1942 Probate Court Order and it can be conceded that the statute of limitations on that Order ran many years ago.

The Second Paragraph of the statement of the Case again blatantly and deliberately misstates the contents of an instrument. The February 21, 1942 state District court Order did not purport to make a determination in the nature of a construction of the trust, but simply repeated the recitation of the $1,800 annual amount from the Probate Court Order. The District Court didn't have time to construe the trust, as the Probate Court had just turned the trust over two days before. Petitioners entirely failed to mention that from time to time the state District Court was requested to construe portions of the will, the last time being in 1948, approximately 38 years before the filing of this action in the Federal District Court. Nevertheless, the State District Court never did construe the Will as to the rights of the Respondent.

The third paragraph of Petitioners' statement of the case is significantly misleading where it infers that the Probate Court and the state District Court had previously determined the amounts due Respondent. The Probate Court had simply recited some of the provisions of the Will, without attempting to construe or interpret them; the state District Court, although requested to construe the Will in 1948, did not do so then or afterwards, and the records in this case contain numerous stipulations between the parties as to amounts to be paid Respondent as determined by the parties, not by the Court, but on each occasion being approved by the state District Court without the Court being called upon to determine anything except to approve the terms of each stipulation (Findings of Fact 24 and 25, pages 5-a and 6-a).

The appeal of the Petitioners did not raise the issue set forth as No. 1 on page 5 of the Statement of the Case, as Findings of Fact Nos. 16 and 22 correctly determined that such issues did not exist, and the Tenth Circuit could not be expected to deal with a hypothetical issue not involved in the case.

The issue set forth as No. 2 on page 6 of the Petition is, again, a non issue, as the federal District Court construed the Will in a declaratory judgment action and declared the rights of the Respondent, without in any respect whatever letting itself become involved in the administration of the trust.

The Tenth Circuit correctly affirmed the Judgment of the federal District Court on the issues adverse to Petitioners.

REASONS FOR DENYING THE WRIT

1. This case is insignificant. Even if the horror stories related by the Petition be true — which they aren't — the courts below have not publicized the horrors. Not a single opinion has been published. The Court of Appeals has specifically stated the lack of precedential value of the case and not

a single judge of the ten active judges of the Tenth Circuit believed the case presented any difficulty sufficient to warrant polling the Court on suggestion for rehearing, which rehearing might have produced a case having "precedential value". The case is important only as it affects the Respondent and her need for an "annual income sufficient to ensure an adequate living". Certainly, if the docket of this Supreme Court of the United States is to remain manageable, the Court must refuse to take so petty a matter.

2. Petitioners do not raise issues that meet the test of Supreme Court Rules 17.1, (a) or (c).

They have failed to support their contentions that state statutes have not been applied. The only state statutes cited by Petitioners pertain to appeals from a probate court. Respondent's corrections to the statement of the case, with reference to the Findings of Fact, supply the reasons why this contention is a non issue, which was how the panel as well as the Tenth Circuit en banc treated such contentions. If the Probate Court had lawfully construed the McClelland Will, rather than just to probate it, Petitioners would have an argument, and the cases cited on pages 6, 7 and 8 under their Reason No. 1 might be applicable. For the reasons previously stated, however, this is a non issue, so found by the District Court and concurred in by the Tenth Circuit.

With respect to Petitioners' Reason No. 2, dealt with on pages 8 and 9 of the Petition, it is not clear whether they are relying on a determination made by the Probate Court or the state District Court. From the cases they cited, it would appear that they contend that the state District Court had made an adjudication which would preclude a federal court from exercising jurisdiction. In the case at bar, the state District Court had done nothing since 1942 to construe the Will as to respondent's rights but it had approved accounts, accepted resignations of trustees, appointed new trustees,

approved payments of requested fees, approved stipulations entered into by beneficiaries and trustees, and prior to 1948 permitted departure from the Will in the sale of real estate. This does not present "an almost identical factual situation" to that in *Buck v. Hales*, CA 10th 1976, 536 F.2d 1330, as asserted by Petitioners. In that case, the trustees had been frequently getting directions from the state court, beginning with construction in 1943, further directions in the ensuing years, resolving disputes between beneficiaries, and between beneficiaries and the trustees, in one of which disputes in 1959 the court specifically stated that "it retains and continues jurisdiction" in such matters, with the most recent Will construction being in March, 1975. The Tenth Circuit heard argument in that case in April, 1976, making it obvious that the federal district court jurisdiction was being invoked nearly contemporaneously with the state court determinations and construction of the Will. In the case at bar the state District Court had construed trustees powers to sell real estate prior to 1948, and had construed nothing since then, had heard no disputes between beneficiaries and trustees and had not had occasion to approve a stipulation pertaining to beneficiary payments since 1982. Further distinguishing *Buck v. Hales*, the jurisdiction of the federal District Court was invoked primarily for relief against mismanagement for unauthorized income payments, to recapture and obtain an accounting of wrongfully distributed mineral interests, and for forfeiture of certain trust rights by certain beneficiaries, some of which had actually been ordered and approved by the state district court. These were circumstances that brought *Buck v. Hales* clearly under the holding in *Princess Lida v. Thompson*, 305 US 456, 83 L.Ed., 285, 59 S. Ct. 275 (1939), the reasoning in which clearly excludes the case at bar from such holding, and places it squarely under the exception pointed out therein, stating that such holding has no application to a diversity case "wherein the plaintiff seeks merely an

adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state Court" (83 L.Ed. at p. 292, Col.1). The holding in *Princess Lida* is expressly limited to an action in federal court brought for the same relief previously being sought and administered in the state district court, which is not the situation in the case at bar.

Until Respondent's action was heard by the federal District Court she had never had her "day in court" in the construction of her grandfather's Will as to support intended for her. Petitioners have fought this effort "tooth and nail", contending on multiple grounds that she was not entitled to a court construction, and that their construction, that of the Grand Lodge and of the Trustee, the Citizen's Bank, was the only construction she was lawfully entitled to. Fortunately for Petitioner, the federal District Court understood and applied the decisions of this Court in *Commonwealth Trust Company v. Bradford*, 297 US 613, 80 L.Ed. 920, 56 S. Ct. 600 (1936) and in *Princess Lida v. Thompson*, supra, (appendix A-2, p. 11-a). The inability or refusal of Petitioners to understand those cases not only resulted in their citing them to the federal District Court as supporting their contentions, resulting in the Court's statement in its Memorandum Opinion " . . . the cases on which defendants rely do not support their argument." It also results in their attempt to obtain a review by this Court by citing *Princess Lida v. Thompson* again, and quoting a portion which is not applicable to the case at bar as if it were decisive, blinding themselves, and dropping a smoke screen in front of this Court, as to the precisely applicable portions quoted by the District court.

This additional attempt to deny Respondent her day in court should fail.

CONCLUSION

With no published opinions below, and unanimity in the Tenth Circuit in affirming the District Court and in denying a rehearing, this case has significance only for the parties, and no new ground will be broken and no law or holdings will be clarified if a review is granted.

The federal District Court clearly had diversity jurisdiction and properly exercised it to construe the testamentary trust brought before it in a declaratory judgment proceeding, not only under the statute (28 USC Sec. 1332(a)(1)), but under this Court's decisions (*Princess Lida v. Thompson*, supra, and *Commonwealth Trust Company v. Bradford*, supra), as well as under the prior decisions of the Tenth Circuit. Its actions in no way conflicted with decisions of the state supreme court as to jurisdiction of district courts or as to applications of state statutes.

The Petition should be denied.

Respectfully submitted

Milton S. Seligman*

Paul A. Phillips
Attorneys for Respondent
Suite 1200-W Sandia Savings Building
400 Gold Ave. SW
Albuquerque, New Mexico 87102
(505) 242-6784

* *Counsel of record.*